

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMES DALE MOSELEY,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF
CORRECTIONS et al.,

Defendants.

CASE NO. 3:16-CV-05698-BHS-JRC

REPORT AND RECOMMENDATION

NOTED FOR: JANUARY 6, 2017

This 42 U.S.C. §1983 civil rights matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. §§ 636 (b)(1)(A) and (B) and Local Magistrate Judge Rules MJR 1, MJR 3, and MJR 4. Before the Court is defendants' motion to dismiss. Dkt. 21.

Plaintiff alleges that he was incorrectly classified as maximum security at the Monroe Correctional Complex and that he was not afforded due process with respect to this classification decision. Because plaintiff has no constitutionally protected right to classification status, he has not demonstrated a deprivation of a constitutional right and the Court recommends that plaintiff's classification claim be dismissed with prejudice. With respect to his due process claim, plaintiff has failed to allege facts showing that he suffered an atypical and significant

1 hardship or that he was denied the opportunity to present his case, and thus, the Court
2 recommends granting defendants' motion to dismiss.

3 However, because plaintiff's opposition to defendants' motion appears to allege
4 additional facts to support plaintiff's due process claim, the Court recommends that plaintiff be
5 granted leave to amend his complaint as to this claim.

6 STANDARD OF REVIEW

7 A court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) of
8 the Federal Rules of Civil Procedure "if it appears beyond doubt that the plaintiff can prove no
9 set of facts in support of his claim that would entitle him to relief." *Keniston v. Roberts*, 717 F.2d
10 1295, 1300 (9th Cir. 1983) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1990)). Mere
11 conclusory statements in a complaint and "formulaic recitation[s] of the elements of a cause of
12 action" are not sufficient. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Chavez v.*
13 *United States*, 683 F.3d 1102, 1108-09 (9th Cir. 2012). "Dismissal can be based on the lack of a
14 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
15 theory." *Ballistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

16 On a motion to dismiss, material allegations of the complaint are taken as admitted and
17 the complaint is to be liberally construed in favor of the plaintiff. *Jenkins v. McKeithen*, 395 U.S.
18 411, 421 (1969), *reh'g denied*, 396 U.S. 869 (1969); *Sherman v. Yakahi*, 549 F.2d 1287, 1290
19 (9th Cir. 1977). When a plaintiff is proceeding *pro se*, his allegations must be viewed under a
20 less stringent standard than allegations of plaintiffs represented by counsel. *Haines v. Kerner*,
21 404 US 519 (1972), *reh'g denied*, 405 U.S. 948 (1972); *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.
22 1 (9th Cir.1985) (en banc) (petitioner should be afforded the "benefit of any doubt").

1 While the court can liberally construe a plaintiff's complaint, it cannot supply an essential
 2 fact an inmate has failed to plead. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (*quoting*
 3 *Ivey v. Board of Regents of University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). The court
 4 need not accept as true unreasonable inferences or conclusory legal allegations cast in the form
 5 of factual allegations. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

6 **PROCEDURAL HISTORY**

7 Plaintiff was granted *in forma pauperis* status on September 20, 2016. Dkt. 7. Plaintiff's
 8 complaint was filed the same day, *see* Dkt. 8. Defendants filed their motion to dismiss on
 9 October 21, 2016. Dkt. 21. Plaintiff filed a response. Dkt. 25. Defendants filed a reply. Dkt. 26.

10 **MATERIALS FOR CONSIDERATION**

11 On October 5, 2016, plaintiff filed several exhibits in support of his complaint including
 12 the DOC Custody Plan and his appeal to DOC headquarters. Dkt. 15. Because the materials were
 13 submitted as part of the complaint, the Court will rely on these documents in addressing
 14 defendants' motion to dismiss. *See Gumataotao v. Dir. of Dep't of Revenue & Taxation*, 236
 15 F.3d 1077, 1083 (9th Cir. 2001).

16 **STATEMENT OF FACTS**

17 Plaintiff, James Dale Moseley, is a Washington state prisoner in the custody of the
 18 Department of Corrections ("DOC") and is currently housed at the Monroe Correctional
 19 Complex ("MCC"). *See* Dkt. Based on the exhibits submitted in support of plaintiff's complaint,
 20 it appears that plaintiff was housed at the Special Commitment Center ("SCC") when he received
 21 his current charges, and was then transferred to DOC custody to serve his sentence. Dkt. 15 at 4.

22 Plaintiff alleges that his constitutional rights were violated when he was placed in the
 23 MCC Intensive Management Unit ("IMU") on June 7, 2016. Dkt. 8 at 3. Plaintiff alleges that he
 24 was "slated" to go to closed custody general population but was referred to maximum custody.

1 *Id.* Plaintiff alleges that his classification decision went before the Intensive Management Status
 2 (“IMS”) Committee and his placement in IMU was finalized on July 11, 2016. *Id.* Plaintiff does
 3 not allege whether he attended an IMS hearing regarding his classification, but the exhibits filed
 4 in support of his complaint do not show that he was in attendance. Dkt. 15 at 3. Plaintiff does not
 5 allege any facts as to whether he was able to present his case to the IMS Committee. *See* Dkts. 8,
 6 15. Plaintiff alleges that he is mentally ill and that defendants did not take into account the
 7 effects of segregation on plaintiff’s health. Dkt. 8 at 3.

8 On July 20, 2016, plaintiff sent a letter appealing his classifications status. Dkt. 15 at 2.
 9 On August 1, 2016, Robert Herzog, Deputy Director, responded to plaintiff’s appeal. Dkt. 15 at
 10 2. Mr. Herzog stated that while plaintiff was in custody of the Department of Social and Health
 11 Services and residing at the SCC, he exhibited threatening and assaultive behavior. *Id.* From
 12 October 2015 to January 2016, plaintiff assaulted another resident, refused staff directives, and
 13 threatened and assaulted staff. *Id.* Based on these offenses, the IMS Committee determined that
 14 plaintiff should be housed in IMU. *Id.* at 2-3.

15 Plaintiff requests that he be released from IMU into general population and that the
 16 prison general population be changed so that no other inmate can be placed in segregation as
 17 their initial classification. *Id.* at 4. Plaintiff also seeks \$3,500 in damages for mental suffering
 18 while in segregation. *Id.*

19 DISCUSSION

20 To state a claim under 42 U.S.C. § 1983, at least two elements must be met: (1) the
 21 defendant must be a person acting under color of state law and (2) his conduct must have
 22 deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of
 23 the United States. *Paratt v. Taylor*, 451 U.S. 527 (1981). A third element of causation is implicit
 24

1 in the second element. *See Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274,
 2 286-87 (1977); *Flores v. Pierce*, 617 F.2d 1386, 1390-91 (9th Cir. 1980), *cert denied*, 449 U.S.
 3 875 (1980).

4 Defendants do not object that they were acting under the color of state law and thus, the
 5 Court addresses whether defendants' conduct deprived plaintiff of any constitutional rights.

6 **A. Classification**

7 The Supreme Court has routinely held that federal prisoners have no constitutionally
 8 protected right to classification status pursuant to the Fourteenth Amendment. *See, e.g.*
 9 *Camarena v. Adams*, 11 Fed.Appx. 789, 790 (9th Cir. 2001); *Moody v. Daggett*, 429 U.S. 78, 88
 10 n. 9 (1976). The Eighth Amendment similarly provides no such protection, since "the mere act of
 11 classification does not amount to an infliction of pain." *Myron v. Terhune*, 476 F.3d 716, 719
 12 (9th Cir. 2007). The Ninth Circuit applied this to Washington state prisoners, holding that they
 13 too have no constitutional right to classification status. *See Hernandez v. Johnston*, 833 F.2d
 14 1316, 1318 (9th Cir. 1987).

15 Therefore, plaintiff has not demonstrated a deprivation of a constitutional right regarding
 16 his classification status at MCC. The Court recommends granting defendants' motion as to this
 17 claim without leave to amend.

18 Plaintiff also states that defendants failed to consider his mental health, but he provides
 19 no factual allegations to support this claim. To the extent that plaintiff seeks to pursue a
 20 conditions of confinement claim related to his mental health treatment, plaintiff is advised that
 21 "the treatment a prisoner receives in prison and the conditions under which he is confined are
 22 subject to scrutiny under the Eighth Amendment." *Helling v. McKinney*, 509 U.S. 25, 31 (1993).
 23
 24

1 If a prison official shows “deliberate indifference” to an inmate’s health or safety, he will be in
 2 violation of this amendment. *Farmer v. Brennan*, 511 U.S. 824, 834 (1994).

3 **B. Due Process**

4 Although plaintiff’s complaint is not entirely clear, it also appears that he alleges that
 5 defendants violated his due process rights when they placed plaintiff in IMU. Dkt. 8 at 3. “It is
 6 well-established that ‘[t]he requirements of procedural due process apply only to the deprivation
 7 of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.’”
 8 *Burnsworth v. Gunderson*, 179 F.3d 771, 774 (9th Cir. 1999) (quoting *Bd. of Regents of State*
 9 *Colleges v. Roth*, 408 U.S. 564, 569 (1972)). “Under *Sandin*, a prisoner possesses a liberty
 10 interest under the federal constitution when a change occurs in confinement that imposes an
 11 ‘atypical and significant hardship . . . in relation to the ordinary incidents of prison life.’” *Resnick*
 12 *v. Hayes*, 213 F.3d 443, 448 (9th Cir. 2000) (quoting *Sandin v. Conner*, 515 U.S. 472, 484
 13 (1995)). “There is no single standard for determining whether a prison hardship is atypical and
 14 significant, and the ‘condition or combination of conditions or factors [of the alleged hardship] . .
 15 . requires case by case, fact by fact consideration.’” *Ramirez*, 334 F.3d at 861 (quoting *Keenan*
 16 *v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996)). Thus, the first step of the due process analysis is to
 17 determine whether plaintiff has a liberty interest protected by due process as to his placement in
 18 IMU at MCC.

19 Prison inmates have a right to due process in connection with placement in more
 20 restrictive facilities or to other housing within a prison only when such placement imposes an
 21 “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison
 22 life.” *Sandin*, 515 U.S. at 484; see also *Ramirez*, 334 F.3d at 860. In *Sandin*, the United States
 23 Supreme Court held that an inmate in Hawaii had no liberty interest in freedom from a period of
 24

1 disciplinary segregation that lasted thirty days where the evidence showed that the conditions in
2 such segregation “with insignificant exceptions, mirrored those conditions imposed on inmates in
3 administrative segregation and protective custody,” and the segregation did not “inevitably
4 affect” the length of his prison sentence. *Id.* at 486-87.

5 While segregation “typically . . . in and of itself does not implicate a protected liberty
6 interest,” it may do so under certain circumstances. *Serrano v. Francis*, 345 F.3d 1071, 1078
7 (9th Cir. 2003) (handicapped inmate confined in administrative segregation for two months
8 without use of his wheelchair suffered an atypical and significant hardship), *cert. denied*, 543
9 U.S. 825 (2004). *See also, Jackson v. Carey*, 353 F.3d 750 (9th Cir. 2003) (allegations of three-
10 custody levels materially different from one another causing major disruption to prisoner’s
11 environment sufficiently plead §1983 due process claim); *Ramirez*, 334 F.3d at 861 (reversing
12 and remanding dismissal of due process claim for application of *Sandin* factors where prisoner
13 alleged his segregated unit was overcrowded and violent, isolation severed ties with his family,
14 he was required to participate in psychiatric programs, and he was in confinement for two years).
15 “What less egregious condition or combination of conditions or factors would meet the test
16 requires case by case, fact by fact consideration.” *Kennan*, 83 F.3d at 1089.

17 In the limited circumstances where such a right exists, “due process requires only the
18 following procedures: prison officials must hold an informal non-adversary hearing within a
19 reasonable time after the prisoner is segregated. The prison officials must inform the prisoner of
20 the charges against the prisoner or their reasons for considering segregation. Prison officials must
21 allow the prisoner to present his views.” *Toussaint v. McCarthy*, 801 F.2d 1080, 1100 (9th Cir.
22 1986) (footnote omitted). “[D]ue process does not require detailed written notice of charges,
23 representation by counsel or counsel-substitute, an opportunity to present witnesses, or a written
24

1 decision describing the reasons for placing the prisoner in administrative segregation.” *Id.* at
2 1100-01.

3 Here, plaintiff acknowledges that he was placed in segregation due to his past offenses at
4 the SCC. Dkt. 8 at 3, Dkt. 15 at 2. In his complaint, plaintiff alleges that defendants failed to
5 take into account the effect of segregation on his mental illness, but he does not describe how the
6 conditions of his segregation amounted to an atypical or significant hardship. *See Sandin*, 515
7 U.S. at 484. The allegations related to the process he was afforded are less clear. Plaintiff alleges
8 that he was informed of the reason for his placement in segregation and was able to appeal his
9 placement in IMU. Dkt. 8 at 3; Dkt. 15 at 2. However, it is not clear whether plaintiff was able to
10 present his case or submit information regarding his placement in IMU. *See id.* It does not appear
11 that plaintiff attended the hearing on July 11, 2016 regarding his classification status. Dkt. 15 at
12 2-4.

13 In opposition to defendants’ motion, plaintiff attempts to supplement the allegations in
14 his complaint. Dkt. 25. Plaintiff alleges that his placement in IMU affects the duration of his
15 sentence because he is losing earned time and his release date is pushed back five days every
16 month. Dkt. 25 at 1. Plaintiff alleges that his mental health has deteriorated since his placement
17 in IMU, and that he has had three medical procedures to remove swallowed objects. *Id.* Plaintiff
18 also alleges that he never had a hearing with the IMS Committee and was not able to present his
19 case. *Id.* In ruling on defendants’ motion, the Court must rely only on the allegations contained
20 in plaintiff’s complaint, Dkt. 8, and the attached exhibits, Dkt. 15. *See Broam v. Bogan*, 320
21 F.3d 1023, 1026 (9th Cir. 2003). However, plaintiff’s response alleges additional facts
22 supporting an atypical and significant hardship and that he was denied due process, and thus, he
23 may be able to overcome the deficiencies of his complaint and state a due process claim if he is
24

1 given an opportunity to amend his complaint. *See Eldridge v. Block*, 832 F.2d 1132, 1135-36
2 (9th Cir. 1987) (The Ninth Circuit has “established that a pro se litigant bringing a civil rights
3 suit must have an opportunity to amend the complaint to overcome deficiencies unless it is clear
4 that they cannot be overcome by amendment.”). Accordingly, the Court recommends granting
5 defendants’ motion as to plaintiff’s due process claim, but gives plaintiff leave to amend to
6 attempt to cure the deficiencies of his complaint.

7 The Court also notes that in his opposition to defendants’ motion, plaintiff alleges that
8 defendants violated plaintiff’s rights under the First Amendment by placing plaintiff in IMU in
9 retaliation for plaintiff’s assaultive conduct. Dkt. 25. As stated above, the Court will not consider
10 any supplemental claims not alleged in his complaint. To the extent that plaintiff seeks to pursue
11 a First Amendment retaliation claim, he is advised that he must allege facts to show: (1) he was
12 subjected to adverse action; (2) the adverse action was imposed because of certain conduct; (3)
13 the conduct giving rise to the adverse action is legally protected; (4) the adverse action chilled
14 the prisoner’s speech; and (5) the adverse action did not advance a legitimate penological goal.
15 *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005).

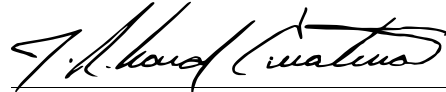
16 CONCLUSION

17 For the reasons set forth above, the Court recommends granting defendants’ motion to
18 dismiss (Dkt. 21) as to plaintiff’s classification claim without leave to amend. The Court
19 recommends granting defendants’ motion as to plaintiff’s due process claim but that plaintiff be
20 granted leave to amend his complaint.

21 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
22 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.
23 6. Failure to file objections will result in a waiver of those objections for purposes of appeal.
24

1 *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the
2 Clerk is directed to set the matter for consideration on **January 6, 2017** as noted in the caption.

3 Dated this 14th day of December, 2016.

4 

5 J. Richard Creatura
6 United States Magistrate Judge
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24